

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION
1:05CV 1111-H

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GREGORY SOWELL

)

VS

)

UNITED STATES OF AMERICA

)

)

Motion of Opposition to Courts'
Recommendation of Dismissal to
§28 U.S.C. 2255¶6(3)

DEBBIE A. CNETT, CLK
DISTRICT COURT
MIDDLE DISTRICT ALA

NOW COMES Petitioner Gregory Sowell through pro-se herein after respectfully ask this Honorable Court, not to misconstrue his 28 USC §2255¶6(3) as an second or successive motion under §2255 the Petitioner states the following in support:

Petitioner filed to the courts on or about Nov. 2005 an 28 USC §2255¶6(3) in accordance to the Supreme Courts recent decision of BOOKER 125, S.Ct 738(2005). Even though Petitioner was sentenced pre-Booker its the fact that BOOKER maybe applied retroactive, therefore, Petitioner displays optimism.

However, the District Court has misconstrued Petitioner most recent motion as an second or successive 28 USC 2255. On or about April 1996, Petitioner did in fact file an 28 U.S.C. §2255 motion that was promptly denied.

Now the Petitioner with 28 USC §2255¶6(3), the district court states that Petitioner must first move in the appropriate court of appeals for an order authorizing the district court to consider this motion. The appellate court, in turn must certify that the second or successive §2255 motion contains (1) newly discovered evidence that if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found that movant guilty of the offense.

With respect to federal court's longstanding practice of sometimes misconstruing a motion, which a pro-se litigant had labeled differently, as the litigants first motion for federal post-conviction relief under 28 USC §2255, a federal district court's misconstruing and/or recharacterization powers were limited, in that the court had

to (1) notify the litigant that the court intended to recharacterize the pleading, (2) warn the litigant that this recharacterization meant that any subsequent §2255 motion would be subject to §2255 restrictions on "second or successive" motion, and (3) provide the litigant an opportunity to withdraw the motion or to amend it so that it contained all the §2255 claims that the litigant believed the litigant had. If the district court failed to do these things, then the motion could not be considered to have become an second and/or successive 28 USC §2255 motion, for purpose of applying to later motions the "second or successive" restrictions, as : No one in the case at hand contested the lawfulness of similiar requirements that had been placed on such recharacterization by nine Federal Courts of Appeal. But the District court clearly fail to issue proper notification to Petitioner in accordance to the initial 28 USC §2255.

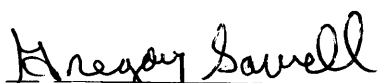
Let the record show, it is an known fact the risk of harming the litigant always exists when the courts misconstrue or recharacterizes into a first §2255 motion a claim that is procedurally or substantively deficient in the manner filed.

In other words, even fully informed district courts that try their best not to harm pro-se litigant by misconstruing many nonetheless end up doing so because they cannot predict and protect against every possible adverse effect that may flow from misconstrue.

Hence, an unwarned misconstrue cannot count as a §2255 motion for purpose of the "second or successive" provision whether or not the unwarned Petitioner takes an appeal solely depends on the dispositions of this courts.

The lack of warning prevnts making an informed judgement in respect to the previously motion filed. Petitioner feels relief should be granted in his behalf along with an other relief this court deems necessary.

Dated: 1-6-06


Gregory Sowell # 08240-002
Federal Correctional Institution
P.O. Box 699
Estill, South Carolina 29918-0699

CERTIFICATE OF SERVICE

I, GREGORY SOWELL, HEREBY DECLARE; UNDER THE PENALTY OF PERJURY THAT A TRUE
COPY OF THE FOREGOING WAS MAILED THIS JAN. 5, 200⁶~~7~~ TO :

Ms. Debara Hackett
Clerk of Court
One Church Street
Montgomery, AL 36104

Respectfully submitted by:

Gregory Sowell
Signature of Petitioner

08240-002
Register Number

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